



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Industrial Storage Equipment-Pacific--
Reconsideration
File: B-228123.2
Date: April 1, 1988

DIGEST

Where protest of agency's decision to reject bid of equal product as nonresponsive under brand name or equal invitation was sustained because it was based on a failure to meet salient characteristics that were not listed in the solicitation, but further review shows that the product in fact will not meet the agency's needs, the bidder should be reimbursed its bid preparation and protest costs.

DECISION

The Department of the Army requests that we reconsider our decision in Industrial Storage Equipment-Pacific, B-228123, Dec. 4, 1987, 87-2 CPD ¶ 551, in which we sustained Industrial's protest of the rejection as nonresponsive of the bid it submitted in response to invitation for bids (IFB) No. DAHC77-87-B-0333.

We affirm our decision.

The IFB solicited bids on five line items, all on a brand name or equal basis. Item 0001 was an upright storage rack; item 0002, a heavy duty crossbar; items 0003 and 0004, pallet storage rack crossbar loadbeams in two sizes; and item 0005, a heavy duty skid channel. For each of the five line items the IFB specified a model number manufactured by Lodi Metal Tech, Inc., or equal, and the required load capacity of the item. For the skid channel and the heavy duty crossbar, the IFB also specified a 48-inch frame depth. In addition, the IFB provided that all items had to be compatible with previously purchased Lodi Metal Tech racks, and meet the stated load capacity.

The Army rejected Industrial's low bid as nonresponsive because it found that although the product offered by Industrial for line item 0001 was acceptable, those offered for line items 0002-0004 had different dimensions than the specified products, and Industrial had not furnished enough

041760

information for the Army to evaluate the product offered for item 0005. Since the solicitation provided for a single award of all line items, the Army awarded a contract to Lodi Metal Tech as the low aggregate responsive bidder.

We sustained Industrial's protest because the IFB did not state the specific dimensions for items 0002-0004 as salient characteristics of the brand name product and because Industrial's item 0005 literature in fact appeared adequate. In doing so we stated the general rule that where an agency does not include a list of salient characteristics in the solicitation the agency is precluded from rejecting an "equal" bid for noncompliance with a specific performance or design feature unless the offered item is significantly different from the brand name product. We also found, however, that it was not clear whether Industrial's offered items in fact would be compatible and thus meet the Army's needs, in view of the difference in dimensions from those of the brand name. We recommended that the Army examine the matter further and either terminate the awarded contract and award one to Industrial, or reimburse Industrial its bid preparation and protest costs.

In its request for reconsideration, the Army first argues that it did not reject Industrial's bid for failure to meet unstated salient characteristics. Rather, the Army asserts, general compatibility with the existing Lodi Metal Tech products, which was required by section B.2(1) of the IFB, was the salient characteristic that Industrial's bid failed to meet, and the agency had no legal obligation to be more specific.

The Army's argument does not address the essential finding of our decision. That finding was that it was clear from the record that the Army never considered actual compatibility except in terms of dimensions not stated in the solicitation, i.e., the fact that the dimensions of Industrial's offered items (for line items 0002-0004) were not quite the same as those of the Lodi Metal Tech equipment. It was precisely for that reason that, instead of sustaining the protest and declaring Industrial entitled to the award, we recommended the Army go back and analyze the compatibility issue in the context of whether the differences in dimensions really meant the respective items were not compatible, or instead "whether the differences might be so slight that Industrial's products in fact are compatible with the Lodi Metal Tech products." Thus, the Army's current position simply does not establish that Industrial's bid properly was rejected as nonresponsive.

The Army also argues that the items offered by Industrial were significantly different from the specified Lodi Metal Tech Items. To support this argument, the Army reiterates something the contracting officer stated in connection with the protest:

" . . . purchase of Industrial Storage's item [0003 and 0004] would have meant recutting hundreds of 2x4s now being used as crossbars and its skid channels [item 0005] and heavy duty crossbars [item 0002] could not be used with the existing Lodi storage racks. . . ."

The Army asserts that our decision thus was incorrect because, as noted above, even where a solicitation issued on a brand name or equal basis does not list salient characteristics of the brand name product, a procuring agency still may reject an offered equal item where that item is significantly different than the brand name product. See Ciba Corning Diagnostics Corp., B-223131, Aug. 13, 1986, 86-2 CPD ¶ 185.

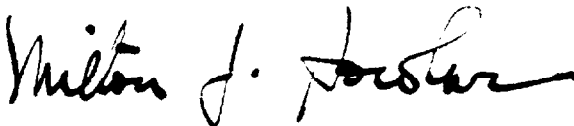
Notwithstanding the stated rule, the Army has not demonstrated that the offered Industrial products are significantly different from the requested Lodi Metal Tech ones. In our view, the fact that Industrial's products have slightly different dimensions than the brand name has does not in itself make the products significantly different. In this respect, as we noted in our prior decision, Industrial furnished our Office an analysis and drawings that seemed to show that its products were not substantially different from, and were compatible with, the specified Lodi Metal Tech products.

In response to our prior decision, and after filing this reconsideration request, the Army reviewed Industrial's products further. This review confirms the agency's earlier position that Industrial's upright storage rack, line item 0001, is acceptable. As to line item 0002, the review shows that the Army's initial concern with the dimensions of the protester's heavy duty crossbars was unwarranted, but that evaluation of a sample Industrial furnished has disclosed that the crossbar is 1/4 inch too long and cannot be manipulated into place. The Army's evaluation of Industrial's pallet storage rack crossbar loadbeams shows that they are not compatible with existing equipment, but not because hundreds of 2x4s the activity now uses as crossbars are too long to fit between them and would have to be cut down, but because they are slightly too short, and the 2x4s thus "do not fit snugly." The Army concludes that this could cause a safety problem in that the 2x4 might slip out of the step-up (the part of the beam on which the

2x4/crossbar end sits), and that it would be impractical to maintain a second set of 2x4s to accommodate Industrial. Finally, the product the protester offered for item 0005 (skid channel) is, the Army now states, compatible.

The recommendation we made in our prior decision was that the Army further review the offered Industrial products and, if the agency still finds them unacceptable, reimburse Industrial the costs it incurred in submitting its bid and pursuing the protest. The record shows that the Army now has conducted the review and, while the agency was wrong about certain of the reasons why it initially found Industrial's bid nonresponsive, the Army maintains that it cannot use all of Industrial's products.^{1/} (As stated above, a single award for all items was contemplated.) In these circumstances, Industrial is entitled to its bid preparation and protest costs, and should submit a claim for such costs directly to the Army. See 4 C.F.R. § 21.6(f) (1987).

Our decision is affirmed.


for Comptroller General
of the United States

^{1/} We note, however, that Industrial has explained that the crossbars are supposed to be 1/4 inch longer than the distance to be spanned, because they are designed to be inserted at an angle and tapped into place.